

SERVICE DATE - JULY 8, 2015

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35141

U S RAIL CORPORATION—CONSTRUCTION AND OPERATION EXEMPTION—
BROOKHAVEN RAIL TERMINAL

Digest:¹ This decision denies a request to reopen a 2010 decision that granted U S Rail Corporation an exemption to construct and operate a new rail line in Brookhaven, N.Y. The Board finds that Brookhaven Rail, LLC and Brookhaven Rail Terminal (collectively, Respondents) have complied with two of three previously imposed environmental conditions. The Board also finds that once Respondents notify the Board's Office of Environmental Analysis that their spill prevention, control, and countermeasures plan satisfies Article 12 of the Suffolk County Sanitary Code (if required by Suffolk County), they will have complied with the third condition.

Decided: July 2, 2015

This decision finds that Brookhaven Rail, LLC (Brookhaven Rail), a Class III rail carrier, and Brookhaven Rail Terminal (BRT),² a railroad transloading facility, have fully complied with two of three environmental conditions previously imposed by the Board, and that Brookhaven Rail and BRT³ have implemented a spill prevention, control, and countermeasures plan (SPCC Plan) that is in substantial compliance with the third condition. The Board finds that once Respondents notify the Board's Office of Environmental Analysis (OEA) that their SPCC Plan satisfies Article 12 of the Suffolk County Sanitary Code (if required by Suffolk County), they will have fully met the third condition. With respect to the other arguments raised by the Town, the Board finds that they do not present sufficient material error, new evidence, or substantially changed circumstances to meet the reopening standard. The Board, therefore, will deny the request of the Town of Brookhaven, N.Y. (the Town) to reopen this proceeding.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² BRT is the trade name for Brookhaven Terminal Operations, LLC. This decision refers to "the BRT" when referring to the actual transload facility.

³ Brookhaven Rail and BRT together are referred to as "Respondents."

BACKGROUND

On September 9, 2010, the Board granted an exemption under 49 U.S.C. § 10502 from the provisions of 49 U.S.C. § 10901 for U S Rail Corporation (U S Rail), a Class III rail carrier, to construct and operate an 18,000-foot rail line (the Line) on a 28-acre parcel (Parcel A) in Brookhaven, Suffolk County, N.Y., subject to certain environmental conditions.⁴ Brookhaven Rail,⁵ a successor to U S Rail, now provides service on the Line to the BRT, which is located on Parcel A. Brookhaven Rail provides rail carrier and transloading services, including the switching and marshaling of rail cars in the BRT. Line-haul freight rail service is provided to the BRT over the Long Island Railroad by New York & Atlantic Railway Company, a Class III rail carrier that interchanges with Brookhaven Rail at the switch lead to the BRT.

In a letter filed on March 14, 2014, the Town requested that the Board reopen the proceeding based on a number of grounds, including the contention that Respondents were not complying with the three environmental conditions imposed by the Board in the 2010 Decision. The environmental conditions required U S Rail to (1) employ best management practices before and during construction to minimize erosion, sedimentation, and instability of soils; (2) develop and implement a SPCC Plan, in accordance with Article 12 of the Suffolk County Sanitary Code and EPA regulations at 40 C.F.R. § 112.7,⁶ to ensure protection of the Nassau-Suffolk Sole Source Aquifer (Aquifer) in the event of an accidental spill; and (3) consult with the United States Department of Agriculture's Natural Resources Conservation Service (USDA-NRCS) at the Syracuse, N.Y. office prior to initiating rail line construction activities at the Brookhaven Rail Terminal site.⁷

On August 28, 2014, the Board directed Respondents to file proof of compliance with the environmental conditions and stated that it would then determine whether the proceeding should be reopened to address compliance with the conditions.⁸ The Board denied the Town's requests to reopen the proceeding on all other grounds.

⁴ U S Rail Corp.—Constr. & Operation Exemption—Brookhaven Rail Terminal (2010 Decision), FD 35141 (STB served Sept. 9, 2010).

⁵ U S Rail assigned its construction and operation authority involving Parcel A together with a leasehold interest in the underlying property to U S Rail New York, LLC (U S Rail NY). U S Rail NY was subsequently renamed Brookhaven Rail, LLC, by its equity-owner, Oakland Transportation Holdings LLC. See Gabriel D. Hall—Corp. Family Transaction Exemption—U S Rail N.Y., LLC, FD 35458 (STB served Jan. 7, 2011); Nev. 5, Inc.—Control Exemption—GTR Leasing LLC, FD 35635 (STB served June 15, 2012).

⁶ As discussed in this decision, Respondents and Suffolk County are still determining the extent to which Article 12 applies to certain BRT operations. Respondents Letter 2, Nov. 25, 2014.

⁷ This decision refers to these as Conditions 1, 2, and 3.

⁸ U S Rail Corp.—Constr. & Operation Exemption—Brookhaven Rail Terminal (2014 Decision), FD 35141 (STB served Aug. 28, 2014).

On September 29, 2014, Respondents submitted a filing asserting that they are in compliance with the three environmental conditions imposed by the 2010 Decision. As evidence, Respondents submitted an Erosion, Sedimentation, and Control Plan (ESC Plan) and a SPCC Plan, as well as copies of their communications with the USDA-NRCS and the Suffolk County Soil and Water Conservation District.

The Town filed a response on October 21, 2014. It alleges that Respondents are illegally transloading used oil on Parcel A and, therefore, failing to “meaningfully comply” with the environmental conditions. Among other arguments, the Town contends that (1) Respondents’ SPCC Plan is deficient because it inadequately protects against spills of used oil and biodiesel,⁹ (2) Respondents’ transloading of used oil violates the parties’ Stipulation of Settlement because it is “solid waste,”¹⁰ and (3) the Board’s environmental review did not consider the transfer of used oil.¹¹

On November 10, 2014, Respondents filed a reply and moved that the Board accept it into the record. Respondents claim that they are not prohibited from transporting used oil, as the Town claims, because used oil does not constitute a “solid waste,” as that term is defined under the Stipulation of Settlement. Respondents further state that the Town concedes that they are in compliance with Conditions 1 and 3. As to the SPCC Plan, Respondents claim that the Town’s contentions are inaccurate and premature, given that an updated SPCC Plan is being developed.

The Town replied on November 14, 2014, and argues, among other things, that Respondents have failed to demonstrate that used oil does not constitute a “solid waste” as defined by the parties’ Stipulation of Settlement.

On November 25, 2014, Respondents filed an updated SPCC Plan as discussed in their November 10 reply. They submitted an additional supplement on December 10, 2014, in response to questions raised by OEA about the September 29 filing.

⁹ Respondents refer to soybean oil. See, e.g., Respondents Letter SPCC Plan 25, Nov. 25, 2014; Respondents Resp. 8-10, Dec. 10, 2014.

¹⁰ The Stipulation of Settlement was an agreement entered into by U S Rail and the Town in 2010, a copy of which was provided to the Board. The Stipulation of Settlement states: “Plaintiffs agree that, in the event the Project receives STB approval, operations at the Property shall not include the...transport or transfer of solid waste...unless required under federal law or regulations.” Among other things, the Stipulation of Settlement also requires the construction of a secondary egress, dust control measures, height limits for buildings and piles of aggregate, landscaping, noise reduction, “dark sky” friendly lighting, and water control measures to protect the Aquifer.

¹¹ Town Reply 9-10, Oct. 21, 2014.

On December 22, 2014, the Town filed a letter noting that, on December 15, 2014, it had filed a request in U.S. District Court for a show cause order to enforce the Stipulation of Settlement.

PRELIMINARY MATTERS

Respondents claim that their November 10 filing will assist the Board in reaching a determination. Similarly, the Town asks that, if the Board accepts the November 10 filing, it also accept the Town's November 14 reply. In the interests of a complete record, all submissions filed are accepted.

DISCUSSION AND CONCLUSION

The issue here is whether this proceeding should be reopened to address Respondents' compliance with the three environmental conditions imposed by the 2010 Decision. Under 49 U.S.C. § 722(c), a petition to reopen may be granted upon a showing of "material error, new evidence, or substantially changed circumstances." As discussed below, the Board finds that Respondents have complied with two of the three environmental conditions imposed by the 2010 Decision and that once Respondents notify OEA that their SPCC Plan satisfies Article 12 of the Suffolk County Sanitary Code (if required by Suffolk County), they will have complied with the third condition. The Board also finds that the Town's claims that Respondents' transloading of used oil violates the parties' Stipulation of Settlement and that the Board's environmental review did not consider the transfer of used oil do not meet the reopening standard.

Condition 1. This condition requires the use of best management practices before and during construction to minimize erosion, sedimentation, and instability of soils. As evidence of compliance, Respondents state that Sidney B. Bowne & Son, LLP (Bowne), a professional engineering firm working on BRT's behalf, has developed and implemented an ESC Plan as a "best management practice" to minimize erosion, sedimentation, and instability of soils,¹² and has inspected BRT's implementation of the ESC Plan twice a month since November 17, 2010.¹³ Respondents also state that Bowne considered whether to develop a formal Storm Water Pollution Prevention Plan (SWPPP) for Parcel A, but determined that a SWPPP was not necessary for the BRT's activities. Respondents note that the Town concurs with this particular determination.¹⁴ Therefore, Respondents state that they are in compliance with Condition 1, but

¹² Respondents Resp. 5, Ex. 1(a), Sept. 29, 2014.

¹³ Respondents Resp. 5-6, Sept. 29, 2014.

¹⁴ Respondents state that the Town copied the New York State Department of Environmental Conservation (NYSDEC) on its confirmation that a formal SWPPP was not required for Parcel A and that BRT confirmed with NYSDEC by phone that it agreed with the Town's determination. Respondents Resp. 5-6, Ex. 1(c), Sept. 29, 2014. See also Respondents Resp. 4, Dec. 10, 2014. Respondents further state that they have not applied for a NYSDEC General Stormwater Permit No. GP-0-10-001 because NYSDEC has not requested additional information regarding the storm water management of Parcel A. Respondents Resp. 6, Sept. 29, 2014.

note that construction of Parcel A is not yet complete. Once construction is complete, Respondents state that they will notify the Board.¹⁵ The Town replies that Respondents' responses are vague and deficient.

Respondents have submitted to the Board, and described how they implemented, an ESC Plan that complies with Condition 1. In addition, Respondents have explained that they determined a SWPPP is not needed for their activities on Parcel A. Based on their ESC Plan and related submissions, we find that Respondents have satisfied Condition 1.

Condition 2. This condition provides for the development and implementation of a SPCC Plan to ensure protection of the Aquifer in the event of an accidental spill. The condition requires that the SPCC Plan be developed in accordance with Article 12 of the Suffolk County Sanitary Code and EPA regulations at 40 C.F.R. § 112.7. The Town contends that Respondents' SPCC Plan is deficient because it inadequately protects against spills of used oil and biodiesel.

Based on Respondents' September 29 and November 25 submissions and OEA's examination of the information provided concerning compliance with the environmental conditions, we find that Respondents have taken reasonable steps to comply with Condition 2.¹⁶ Respondents have a SPCC Plan in place that explains how to respond to spills. Respondents' updated SPCC Plan addresses the containment of used oil and soybean oil in spill events and, in accordance with the 2010 Decision, complies with EPA regulations at 40 C.F.R. §§ 112.7-8.¹⁷

However, the SPCC Plan is not yet in compliance with Article 12 of the Suffolk Sanitary Code, as was also required by the 2010 Decision. Respondents state that they and Suffolk County currently are determining the extent to which this provision applies to the BRT's used oil operations.¹⁸ We, therefore, will direct Respondents to notify OEA when their SPCC Plan becomes compliant with Article 12 of the Suffolk Sanitary Code, or when Suffolk County determines that such compliance is not required.

¹⁵ Respondents Resp. 7, Sept. 29, 2014.

¹⁶ Although the Town argues that a "Polymer Plant" and an "Asphalt Cement Terminal" located on Parcel A are not in compliance with the environmental conditions, the Town provides insufficient evidence for the Board to determine the extent to which such facilities are, or should be, in compliance with the three environmental conditions or are otherwise subject to the Board's jurisdiction. The Town has not provided information explaining, for example, whether these facilities are currently being constructed, or whether they exist and are operational. Compare Town Reply 20, Oct. 21, 2014 with Respondents Letter 11-12, Dec. 10, 2014 (identifying all operations and storage areas on site).

¹⁷ Respondents state that the SPCC Plan also complies with NYSDEC regulation N.Y. Comp. Codes R. & Regs. tit. 6, § 374-2.6—Standards for Used Oil Processors and Re-refiners. See Respondents Resp. 8, Sept. 29, 2014.

¹⁸ Respondents Letter 2, Nov. 25, 2014.

Because Respondents' SPCC Plan addresses the containment of used oil and soybean oil in spill events and complies with the EPA regulation required by the 2010 Decision, we find that the only outstanding requirement with respect to Condition 2 is for Respondents to satisfy Article 12 of the Suffolk County Sanitary Code. Respondents have shown that they are in the process of determining the extent to which Article 12 applies to their operations. We, therefore, will consider Condition 2 to have been met once Respondents notify OEA that their SPCC Plan is compliant with Article 12 of the Suffolk Sanitary Code, or that Suffolk County has found that such compliance is not required.

Condition 3. Condition 3 provides for consultation with the USDA-NRCS at the Syracuse, N.Y. office prior to initiating rail line construction activities at the BRT. As proof of compliance, Respondents provide evidence of their communications with the USDA-NRCS regarding "the final site plan, NRCS practices to improve successful establishment, long-term survival and future functional value of new planting at the BRT."¹⁹ Respondents also state that they conferred with the Suffolk County Soil and Water Conservation District, as directed by USDA-NRCS.²⁰ We find that Respondents have provided sufficient evidence of compliance with Condition 3.

Because Respondents have complied with Conditions 1 and 3, and substantially complied with Condition 2, there are no grounds for reopening this proceeding.

Further, the Town's other arguments do not present material error, new evidence, or substantially changed circumstances that meet the reopening standard. The Town principally contends that BRT's transloading of used oil on Parcel A violates the Stipulation of Settlement negotiated by the parties.²¹ The Town's December 22 letter, however, indicates that this issue is currently the subject of court litigation.²² A dispute over the interpretation of a private contract is generally for the courts to decide. PCI Transp., Inc. v. Fort Worth & W. R.R., NOR 42094

¹⁹ Respondents Resp. 9, Ex. 5, Sept. 29, 2014.

²⁰ Respondents Resp. 9, Ex. 6, Sept. 29, 2014.

²¹ Town Reply 14, Oct. 21, 2014.

²² The Town's December 22 letter noted that, on December 15, 2014, it had filed a request in U.S. District Court for a show cause order to enforce the Stipulation of Settlement. The Town states that it seeks to prevent the handling, storage, or transportation of used oil at the BRT. The Town further indicates that BRT has agreed to "promptly cease all further importing, exporting, transloading, handling, storing, or otherwise processing used oil" at Parcel A until the parties reach a global settlement agreement.

The parties are reminded that licensed rail carriers normally have a common carrier obligation, and as such, must provide service upon reasonable request, subject to certain exceptions. But see 49 U.S.C. § 10908 (relating to solid waste). Cf. Eric Strohmeier—Acquis. & Operation Application—Valstir Indus. Track in Middlesex & Union Cntys., N.J., FD 35527 (STB served Oct. 20, 2011), aff'd, Riffin v. STB, 733 F.3d 340 (D.C. Cir. 2013).

(Sub-No. 1), slip op. at 4-5 (STB served Apr. 25, 2008); Gen. Ry.—Exemption for Acquis. of R.R. Line—in Osceola & Dickinson Cntys., Iowa, FD 34867, slip op. at 4 (STB served June 15, 2007).

The Town also asserts that the Board’s environmental review conducted prior to the 2010 Decision did not consider the transfer of used oil.²³ However, when U S Rail filed its petition for exemption under 49 U.S.C. § 10502, it was responsible for notifying the Board of its proposed activities at the time. OEA, in turn, properly analyzed the environmental impacts of U S Rail’s proposed rail line, including cumulative impacts from the proposed rail transloading facilities. After the Board conducted its environmental review and issued the 2010 Decision, U S Rail and its successors could transload other commodities without additional Board approval.²⁴ Absent evidence that U S Rail planned to transload, or had reason to anticipate transloading, used oil when it filed its petition for exemption,²⁵ the Board finds that the Town has not demonstrated the material error, new evidence, or substantially changed circumstances that would support reopening this proceeding.

It is ordered:

1. All submissions filed with the Board are accepted into the record.
2. Respondents are directed to notify OEA once their SPCC Plan becomes compliant with Article 12 of the Suffolk County Sanitary Code, or when Suffolk County determines that such compliance is not required.
3. The Town’s request to reopen this proceeding is denied.
4. This decision is effective on the date of service.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Miller.

²³ Town Reply 9-10, Oct. 21, 2014.

²⁴ If the Board were required to reopen each licensing proceeding and conduct additional environmental review every time a rail carrier transports or transloads a new commodity, the Board’s licensing proceedings and accompanying environmental reviews would never conclude.

²⁵ The Town also does not show that U S Rail specifically intended to attract shippers of used oil when U S Rail stated in its petition for exemption that it hoped “to attract additional in and outbound traffic” at the BRT. Pet. Ex. A, Aug. 7, 2008.